No. 12197

In the United States Court of Appeals for the Ninth Circuit

LOUISE HAMILTON, APPELLANT

v.

NATIONAL LABOR RELATIONS BOARD, APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

DAVID P. FINDLING,
Associate General Counsel,
A. NORMAN SOMERS,
Assistant General Counsel,
ALBERT M. DREYER,
Attorney,
National Labor Relations Board,
Washington 25, D. C.

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AUTHORITIES CITED

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JURISDICTION

This is an appeal from an order of the district court for the Northern District of California requiring the appellant to comply with a subpoena *duces tecum* issued by the National Labor Relations Board pursuant to Section 11 (1) of the National Labor Relations Act as amended (61 Stat. 136, 29 U. S. C. Supp. I (1947) 151 et seq.) hereinafter referred to as the Act.[1] As shown by the Board's application for the order (R. 1–8), the jurisdiction of the district court was invoked pursuant to Section 11 (2) of the Act. The jurisdiction of this Court is invoked pursuant to § 28 U. S. C. 1291. The order from which the appeal is taken was entered on January 17, 1949 (R. 55).

[1] The relevant portions of the Act are printed in appendix A, *infra* p. 24 *et seq.*

The notice of appeal was filed on January 26, 1949 (R. 56).

STATEMENT OF THE CASE

On January 26, 1948, pursuant to Section 10 (b) of the Act, the International Union of Brewery, Flour, Cereal and Soft Drink Workers of America, Local 227,[2] hereinafter referred to as the Union, filed with the Board second amended charges against several employers alleging that they had, in July and August, 1946, engaged in unfair labor practices within the meaning of Sections 8 (1) and (3) of the Act by discharging some 26 employees because of their membership in the Union (R. 31, 33, 35). Among the employers named in the second amended charges was the Ranier Distributing Co., a copartnership consisting of A. Levy and J. Zentner Co., a California corporation and several individuals (R. 35). The second amended charges were served upon the employers on February 10, 1948 (R. 21).[3]

On April 26, 1948 the General Counsel of the Board made and entered an order consolidating the cases against the several employers (R. 24), and on the same day issued a complaint charging the employers with the unfair labor practices referred to in the second amended charges filed by the Union (R. 26).[4] The

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[2] The International Union is affiliated with the Congress of Industrial Organizations.

[3] The original charges were served many months before.

[4] The complaint alleges that on or about December 31, 1946, A. Levy and J. Zenter Co., acquired the interests of its copartners in the Ranier Distributing Co., and thereafter conducted the business of that partnership under the name of Valley Beverage Company as the successor thereof (R. 27).

employers having answered the complaint, a hearing was begun before a Trial Examiner of the Board at Sacramento, California, on January 14, 1948 (R. 3, 16). On June 23, 1948, a subpoena *duces tecum* was issued by a member of the Board requiring appellant, Louise Hamilton, to appear and testify before the Trial Examiner and to produce certain books, records and documents of A. Levy and J. Zentner Co., in her possession as bookkeeper of that concern (R. 5, 17). The relevancy and competency of the evidence, oral and documentary, sought to be secured by the subpoena, as well as appellant's ability to produce the books, records and documents demanded, are conceded (R. 18).

In accordance with the Rules and Regulations of the Board, appellant appeared specially before the Trial Examiner and moved to quash the subpoena on the ground that the Board was without jurisdiction to entertain the proceedings in aid of which it was issued because the second amended charges on which the complaint was based were filed and served more than six months after the occurrence of the alleged unfair labor practices, and because it did not appear from the complaint or otherwise that the Union and its officers had complied with the requirements of Sections 9 (f) (g) and (h) of the Act and because the Trial Examiner had excluded evidence as to whether or not the Union and its officers had complied with the sections mentioned (R. 9–12). The motion was overruled, and appellant on the advice of counsel refused to testify or to produce the books, records and documents demanded by the subpoena (R. 6, 17).

Thereupon the Board filed with the district court, pursuant to Section 11 (2) of the Act, an application for an order requiring appellant to comply with the subpoena (R. 1). To this application appellant filed an answer in which she asserted that the Board was without authority to conduct or entertain the proceedings in aid of which the subpoena was issued, and therefore without authority to issue the subpoena, because the second amended charges were filed and served more than six months after the occurrence of the alleged unfair labor practices on which the proceedings were based and because the labor organization which filed the charges and its officers had failed to comply with the requirements of Sections 9 (f) (g) (h) of the Act, and that if she were compelled to comply with the subpoena her rights under the Fourth and Fifth Amendments to the Constitution would be invaded (R. 12–23). The Court in a written opinion (R. 5054) held that there had been timely service of the amended Charges (R. 52) and held that in any event the issues raised by appellant could not be litigated in a proceeding under Section 11 (2) of the Act to compel obedience to a subpoena it accordingly entered an order (R. 55) requiring the appellant to comply with the subpoena. From this order appellant has appealed.

ARGUMENT

I

Appellant being a witness and not a party in the proceeding before the Board is without standing to challenge the Board's jurisdiction over the particular case before it

It is conceded that the evidence, oral and documentary, sought by the subpoena is material and com-

petent (R. 18). It is also conceded that appellant can comply with the subpoena by giving and producing the evidence which it demands (R. 18). It is clear, if not expressly conceded, that the documentary evidence which the subpoena requires appellant to produce is not her property. The owner of that evidence, appellant's corporate employer, is not a party to this appeal or to the proceeding in the Court below. Appellant is not a party to the proceedings before the Board. Her only relation to those proceedings is that of a witness. The only excuses which she gives for not complying with the subpoena is that those proceedings are barred by the statute of limitations and that the Board is precluded from conducting and entertaining them at the instance of the Union.

These are objections which appellant, as a witness, is without standing to raise. They relate to matters which are no concern of hers. A witness has never been permitted to refuse to give evidence because the action is barred by the statute of limitations, or because the complaining party is precluded from invoking the jurisdiction of the tribunal. *Nelson* v. *United States,* 201 U. S. 92, 115; *Bevin* v. *Krieger;* 289 U. S. 459, 463–464; *Fairfield* v. *United States,* 146 F. 508, 509 (C. A. 8).

Even if appellant's objections to the enforcement of the subpoena went to the jurisdiction of the Board to entertain the proceedings in which the subpoena was issued (which as we shall presently show is not the case, see *infra,* p. 10), Appellant does not have the necessary standing to assert them. This is made manifest by the authorities.

A leading case is *Blair* v. *United States,* 250 U. S. 273. The appellants in that case were witnesses who had been called before a grand jury in the Southern District of New York in an investigation concerning violations of the Corrupt Practices Act of June 25, 1910 (36 Stat. 622) in connection with the verification and filing in that district of reports to the Secretary of the Senate of the United States, made by a candidate for nomination as Senator at a primary election held in the State of Michigan, on August 27, 1918. They appeared but declined to answer questions on the ground, as they claimed, that there was no jurisdiction in a court and grand jury of the Southern District of New York to inquire into the conduct of a campaign in Michigan for the nomination of a United States Senator; that the Federal Corrupt Practices Act, as amended was unconstitutional; and that no federal court or grand jury in any state had constitutional authority to conduct an inquiry regarding a primary election for the nomination of a United States Senator. Upon refusal to answer they were held guilty of contempt and remanded to the custody of the marshall. The case came up to the United States Supreme Court on a writ of error and an appeal from a decision of the district court dismissing a writ of habeas corpus sued out by the appellants for their release. The court affirmed the judgment of the district court.

The court said (250 U. S. p. 278):

> It is maintained further that, because of the invalidity of these statutes, neither the United States district court nor the federal grand jury

> has jurisdiction to inquire into primary elections or to indict or try any person for an offence based upon the statutes, and therefore the order committing appellants is null and void.
>
> We do not think the present parties are so entitled, since a brief consideration of the relation of a witness to the proceeding in which he is called will suffice to show that he is not interested to challenge the jurisdiction of the court or grand jury over the subject-matter that is under inquiry.

After reciting the historical basis for the power of compulsory process to require witnesses to appear and give evidence, the court said (p. 282):

> On familiar principles, he is not entitled to challenge the authority of the court or of the grand jury, provided that they have a *de facto* existence and organization.
>
> And for the same reasons, witnesses are not entitled to take exception to the jurisdiction of the grand jury or the court over the particularly subject matter that is under investigation. In truth it is in the ordinary case no concern of one summoned as a witness whether the offense is within the jurisdiction of the court or not.

The doctrine established by the *Blair* case *supra,* has been consistently followed and approved. *United States* v. *McGovern,* 60 F. 2d 880 (C. A. 2); *United States* v. *Watson,* 266 F. 736 (D. C. N. D. Fla.). It is not confined to grand juries but extends to all lawfully created tribunals including administrative bodies. *Howat* v. *Kansas,* 258 U. S. 181, 186 (Kansas Court of Industrial Relations); *Perkins* v. *Endicott Johnson Corp.,* 128 F. 2d 208, 213, 214 (C. A. 2),

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affirmed 317 U. S. 501 (Secretary of Labor); *Brownson* v. *United States,* 32 F. 2d 844, 847 (C. A. 8) (Commissioner of Internal Revenue); *United States* v. *Government of Germany,* 5 F. Supp. 97, 99 (E. D. N. Y.) (Mixed Claims Commission).

The case of *Howat* v. *Kansas, surpa,* is particularly in point. There the plaintiffs in error were adjudged in contempt by a state court for failing to obey its order to comply with a subpoena issued by the Industrial Court of Kansas, which although called a court was in fact an administrative board acting under subpoena powers similar to those of the Board here.[5] They sought reversal of the judgment of contempt, which had been affirmed by the Supreme Court of Kansas, on the ground that the statute creating the Industrial Court was unconstitutional. Affirming the judgment the Supreme Court said with reference thereto (258 U. S. at p. 186):

> It would seem to be sustained also by the decision of this court in *Blair* v. *United States,* 250 U. S. 273, wherein it was held that a witness summoned to give testimony before a grand jury in the District Court of the United States was not entitled to refuse to testify when ordered by the Court to do so upon the plea that the court and jury were without jurisdiction over the supposed offense under investigation because the statute denouncing the offense was unconstitutional.

The foregoing authorities make it clear, we submit, that appellant is without standing to resist enforce-

[5] 258 U. S. at p. 184.

ment of the subpoena on the grounds that she asserts on this appeal. The only excuses which she may, as a witness, rightfully urge for refusing to obey the subpoena admittedly do not exist. These are that the subpoena was not issued in accordance with the statute, that compliance therewith will violate appellant's personal privilege against self-incrimination or that the subpoena is so vague or broad as to be the equivalent of an illegal search [6] *Perkins* v. *Endicott Johnson Corporation,* 128 F. 208, 213 (C. A. 2), affirmed 317 U. S. 501. It is not contended that the subpoena was not issued in accordance with the statute. The evidence required to be produced consists of corporate records. The privilege against self-incrimination therefore does not apply. *United States* v. *White,* 322 U. S. 694, 699; *Bowles* v. *Northwest Poultry & Dairy Products Co.,* 153 F. 2d 32, 34 (C. A. 9). And it is conceded that the evidence is relevant and that appellant has the power to produce it. The Constitutional guaranty against unlawful searches and seizures is, therefore, equally inapplicable. *Oklahoma Press Publishing Co.* v. *Walling,* 327 U. S. 186, 208–209. It necessarily follows, therefore, that appellant is without standing to resist compliance with the subpoena.

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[6] As the Court of Appeals for the Eighth Circuit said in *Fairfield* v. *United States*, 146 F. 508, 509, the witness' "personal privileges and a gross abuse of the process of the court are the only sufficient excuses for his failure to obey."

II

The authority of the Board to conduct the proceeding in which the subpoena was issued cannot be litigated in this case

Even if appellant had the requisite standing to assert the defenses which would be available to her employer, the Board's right to have the subpoena enforced cannot be defeated on any of the grounds urged by appellant on this appeal. The only reason which appellant advances why enforcement of the subpoena should be denied is that the Board lacked jurisdiction to conduct the proceeding in aid of which the subpoena was issued. She bases this contention on three grounds, first, that the administrative proceeding before the Board was not seasonably instituted; secondly, that the Union was without standing to invoke the processes of the Board because of the alleged failure of itself and its officers to comply with the requirements of Sections 9 (f) (g) and (h); and thirdly, that neither the pleadings nor the proof in the administrative proceedings before the Board showed that the charge which the Union filed had been filed and served within the time limited by Section 10 (b) or that the Union and its officers had complied with Sections 9 (f) (g) and (h) of the Act. These are objections which do not go to the jurisdiction or authority of the Board at all but pertain solely to the merits.[7] *General*

[7] Appellant's reliance upon *Donnelly Garment Co.* v. *International Ladies Garment Workers' Union*, 99 F. 2d 309, 316 (C. A. 8) and *Grace* v. *Williams*, 96 F. 2d 478, 481 as tending to show that the requirements of the proviso of Section 10 (b) and Section 9 (f), (g) and (h) are jurisdictional is misplaced. Both decisions involved the Norris-La Guardia Act, the express purpose of which, as its title shows, was to limit the jurisdiction of the district

Investment Co. v. *New York Central R. Co.,* 271 U. S. 228, 231; *Foltz* v. *St. Louis & S. F. Ry. Co.,* 60 F. 316 (C. A. 8); *Shodde* v. *United States,* 69 F. 2d 866, 868 (C. A. 9). But whether they go only to the merits or to the jurisdiction of the Board, they raise issues of law and fact which the Board has the power to decide and in fact must decide in the course of the administrative proceeding, subject to the judicial review by the appropriate Court of Appeals in proceedings brought under Section 10 (e) or (f) of the Act.[8]

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courts. Other statutes similar in language to the statutory provisions which appellant seeks to invoke have been held not to be jurisdictional. *Allen* v. *Regents*, 304 U. S. 439, 449; *Smith* v. *Apple*, 264 U. S. 274, 278, 279.

[8] Respondent's position would not be improved even if the merits were in issue. For example, with respect to the question whether the administrative proceeding was seasonably begun, the formal records of the Board show that the original charge was filed by the Union in September 1946. At that time there was no time limitation prescribed by the Act for the filing of charges nor was it necessary for a union in order to invoke the Board's processes to comply with the requirements now prescribed by Section 9 (f), (g), and (h). It is well settled that although a charge is necessary to set the machinery of an inquiry in motion it is not even a pleading (*N. L. R. B.* v. *Indiana & Michigan Electric Co.*, 318 U. S. 9, 17) and that once a charge is filed the Board's jurisdiction attaches and is not defeated or impaired by the subsequent withdrawal of the charge. *N. L. R. B.* v. *General Motors Corporation*, 116 F. 2d 306, 312 (C. A. 7); *N. L. R. B.* v. *Federal Engineering Co.*, 153 F. 2d 233 (C. C. 6).

Again, even if there had been no service of the charge before the effective date of the 1947 amendments to the Act, on the basis of the well-established doctrine that a newly enacted statute of limitations operates prospectively only, service of the charge within 6 months after the effective date of the amendment was for the reasons stated by the Court below (R. 52), timely in any event. See also *Carscadden* v. *Alaska*, 105 F. 2d 377 (C. A. 9).

Furthermore, as to the question whether the requirements of Section 9 (h) have been met, affidavits on file with the Board

Such issues, even though they may be said to be jurisdictional, cannot be litigated in subpoena enforcement proceedings. This has been settled at least since the Suupreme Court's decision in *Endicott Johnson Corp.* v. *Perkins,* 317 U. S. 501. In that case the Secretary of Labor issued a subpoena in aid of an administrative proceeding which had been begun under the Walsh Healey Act. Compliance with the subpoena having been refused, the Secretary applied to the District Court for an order to enforce it. The District Court denied the application because it was of the opinion that the Secretary was not authorized to conduct the administrative proceeding because the defendant was not covered by the Act under which the Secretary was proceeding. In affirming the decree of the Court of Appeals, which reversed the judgment of the district court, the Supreme Court held the question of the Secretary's jurisdiction was not an issue which could be raised in subpoena enforcement proceedings. In so doing the Court said:

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show that all of the officers of the International Union have complied with that Section and that the officers of the local union had been removed by the International Union in accordance with the Constitution and Bylaws of that organization and had been superseded by officers appointed by the International Union who have complied with Section 9 (h). As to whether or not the Union had complied with Section 9 (f) and (g), a certificate issued by the Secretary of Labor shows that it has.

We mention the facts in this note not for the purpose of meeting appellant's contentions on the merits but primarily to show that they raise issues of law and fact which are determinable within the administrative proceeding only and not collaterally in a special statutory proceeding in aid of the administrative inquiry.

> Nor was the District Court authorized to decide the question of coverage itself. The evidence sought by the subpoena was not plainly incompetent or irrelevant to any lawful purpose of the Secretary in the discharge of her duties under the Act, and it was the duty of the District Court to order its production for the Secretarys' consideration. * * *
>
> The petitioner has advanced many matters that are entitled to hearing and consideration in its defense against the administrative complaint, but they are not of a kind that can be accepted as a defense against the subpoena (317 U. S. at p. 509).

This ruling was reaffirmed by the Supreme Court in *Oklahoma Press Publishing Co.* v. *Walling,* 327 U. S. 186, and has been consistently followed by all the Courts of Appeals which have considered the matter; *N. L. R. B.* v. *Northern Trust Co.,* 148 F. 2d 24, 27 (C. A. 7); *N. L. R. B.* v. *Barrett Co.,* 120 F. 2d 583 (C. A. 7); *Cudahy Packing Co.* v. *N. L. R. B.,* 117 F. 2d 692 (C. A. 10).

In adopting the Administrative Procedure Act Congress enacted into positive law the rule laid down by the Supreme Court in the *Endicott-Johnson* case. As originally introduced, the proposed Section 6 (c) of the bill which upon enactment became the Administrative Procedure Act provided in pertinent part as follows:

> Upon any contest of the validity of a subpena or similar process or demand the Court shall determine all relevant questions of law raised by the parties, including the authority or jurisdiction of the agency, and in any proceeding

> for enforcement shall enforce (by the issuance of an order requiring the production of the evidence or data under penalty of punishment for contempt in case of contumaceous failure to do so) or refuse to enforce such subpoena accordingly.

Both the Attorney General and the Board protested to the appropriate Congressional Committees against this provision which would make the jurisdiction or authority of the agency a litigable issue in subpoena enforcement proceedings. The Attorney General in his comments on the bill said:

> Particular note should be had of the requirement that upon resort to the Court for enforcement of a subpoena, the court shall determine all questions of law raised by the parties including the agency's authority or jurisdiction in law or in fact. By this provision the bill overrules the recent decision in *Endicott-Johnson* (63 S. Ct. 339), in which the court explicitly held that the question of jurisdiction of the agency is not normally open to the courts in a subpoena enforcement case. A rather fundamental question of administrative policy and procedure is involved in the issue. If an agency's jurisdiction can first be tested through the courts before the agency can proceed to final decision the doctrine of *Myers* v. *Bethlehem Shipbuilding,* 303 U. S. 41, is effectively defeated. The result is piecemeal litigation and delay while the case must go through the courts not once but twice. In cases where the question of jurisdiction is in the first instance for the agency to decide, every reason of orderly administrative procedure calls for leaving the sit-

uation where it is left by the *Endicott-Johnson* case. It would be extraordinarily burdensome to call for a court trial on the issue of jurisdiction as a preliminary to the agency's going forward with its own hearing. This does not leave the court as a rubber stamp; as the Supreme Court observed in the *Endicott-Johnson* case, constitutional issues relating to the scope of the subpoena and of the authority of the signer of the subpoena are for the judiciary in enforcement proceedings. But that is the limit of the permissible inquiry of the court. It is submitted that the reasons, both legal and practical, for not tampering with the rule of that case are persuasive. The alternative would threaten break-down of administrative enforcement altogether (Attorney General's Comments on S. 2030—78th Cong., 1st Sess.).

In its comments on the bill, the Board said:

> The provision that the courts, upon contest of the validity of a subpoena or similar process or demand shall determine all questions of law raised by the parties including the agency's authority or jurisdiction, makes a substantial and, in the Board's view, a highly undesirable change in the law. The law is now well settled that questions as to the Board's authority and jurisdiction are not open to review by the District Courts in proceedings to enforce a subpoena or otherwise; these questions are left to determination by the appropriate appellate court upon enforcement or review proceedings of the Board's final decision and order. This procedure has the advantage of avoiding piecemeal litigation and duplicitous review of jurisdictional issues. It also has a sound practical

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> basis, for frequently issuance of a subpoena is necessary to develop the facts as to whether or not jurisdiction exists in the Board. Accordingly it is necessary in practice for the subpoena to be enforced *before* the Board's jurisdiction is or can be established. (Citing language from *N. L. R. B.* v. *Barrett,* 120 F. 2d 583, 585–589.) See also *N. L. R. B.* v. *Northern Trust Co.,* 56 F. Supp. 335 (D. C. Ill.) affirmed Feb. 28, 1945, 16 L. R. R. 559 (C. A. 7); *Endicott-Johnson* v. *Perkins,* 317 U. S. 501. We submit that the reasons for the preservation of the present rule are persuasive and that the adoption of the proposed change might seriously impair administrative enforcement.

Section 6 (c) (5 U. S. C. 1005 (c)) as finally enacted in the Administrative Procedure Act was thereupon changed to read as follows:

> Upon contest the court shall sustain any such subpoena or similar process or demand to the extent that it is found to be in accordance with law, and, in any proceeding for enforcement, shall issue an order requiring the appearance of the witness or the production of the evidence or data within a reasonable time under penalty of punishment for contempt in case of contumaceous failure to comply.

Commenting on this language, the Attorney General in an Additional Statement which was made a part of the Congressional Record by Representative Hobbs while the bill was being debated in the House, said the following:

> Under Section 6 (c) it is provided that "upon contest the court shall sustain any such

> subpoena or similar process or demand to the extent that it is in accordance with law." This provision is not intended to change the law as expounded in *Endicott Johnson* v. *Perkins* (317 U. S. 501, 1943), in which the Supreme Court held that a subpoena issued by an agency will be accorded due respect by the Court if they are within the agency's power and that there would be no independent inquiry as to whether the particular person subpoenaed comes within the coverage of the Act enforced by the agency. The law as expounded in *Endicott Johnson* v. *Perkins* is still applicable. All that this section requires is that the court determine whether the subpoena issued comes within the general power of that agency. There need be no *in limine* inquiries as to whether the person subpoenaed is or not covered by the act (Attorney General's Additional Statement, 92 Cong. Rec. A. 2988).[7a]

There is no contention here that the Board lacked jurisdiction or authority to initiate, entertain and decide cases of the same general type and class as the proceeding in which the subpoena was issued. Indeed that proceeding is an ordinary unfair labor practice case in which appellant's employer is charged with having engaged in an unfair labor practice by discharging employees because of union activities. Nor is it contended that the subpoena was not issued in accordance with the requirements of the statute or

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[7a] The foregoing observation on Section 6 (c) is again set forth with additional supporting material in the Attorney General's Manual on the Administrative Procedure Act (pp. 68–69), the relevant portions of which are reproduced in Appendix B *infra*, p. 30, *et seq.*

that the scope of the subpoena is so broad as to be oppressive. And it is expressly conceded that evidence demanded is relevant. In these circumstances, the issues as to whether the proceeding before the Board was barred by the period of limitation prescribed by the proviso to Section 10 (b) of the Act, and whether the Union and its officers had complied with the requirements of Section 9 (f) (g) and (h) can no more be litigated in subpoena enforcement proceedings than the substantive issue whether appellant's employer had in fact discharged employees because of union activities, or the jurisdictional issue whether the unfair labor practice in which appellant's employer is alleged to have engage affected commerce as defined in the Act.

Sections 10 (e) and (f) make elaborate provisions whereby an employer may obtain judicial review of any action taken by the Board. These provisions have been held to satisfy the requirements of due process of law and to be exclusive. *N. L. R. B.* v. *Jones & Laughlin Steel Corp.,* 301 U. S. 1, 46, 47; *Myers* v. *Bethlehem Shipbuilding Corp.,* 303 U. S. 41, 49; *Newport News Shipbuilding & Dry Dock Co.* v. *Schauffler,* 303 U. S. 54. In view of this fact, it is established that an employer could not enjoin the proceedings in which the subpoena was issued. *Myers* v. *Bethlehem Shipbuilding Corp., supra; Newport News Shipbuilding & Dry Dock Co.* v. *Schauffler, supra.* Yet if the contentions which appellant urges on this appeal were sustained she could achieve by indirection what she would not be permitted to accomplish directly. As the Court of Appeals for the Seventh Circuit said

in *N. L. R. B.* v. *Northern Trust Co.*, 148 F. 2d 24, 27 (certiorari denied, 326 U. S. 731):

> The *Myers* and *Newport News* cases, *supra*, make it plain that the initial determination of jurisdiction by the Board may not be enjoined, and obviously this prohibition would become meaningless if judicial examination of the same question were permitted in a subpoena enforcement action.[9]

This is not to say that the remedies made available to employers by Sections 10 (e) and (f) of the Act could be resorted to by appellant. She is not a party to the proceeding before the Board and cannot be affected by any order that the Board may ultimately enter. As we have shown, *supra* p. 4–9, appellant is a mere witness and therefore has no standing to challenge the jurisdiction of the Board. This is only to say that even if the defenses which would be available to her employer, were also available to her, they would still be irrelevant in this proceeding. If her employer could not, under the doctrine expounded in the *Myers* and *Newport News* cases, assert the defenses on

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[9] See also *Perkins* v. *Endicott-Johnson Corporation*, 128 F. 2d 203, 219 (C. A. 2d), affirmed 317 U. S. 501, where the court said:

"The doctrine of the *Bethlehem, Schauffler and Edison* (*Federal Power Comm.* v. *Metropolitan Edison Co.*, 304 U. S. 375) cases would become frivolous and lack real substance; it would relate merely to one procedural device utilized by a respondent wishing to have the courts interfere with what the Supreme Court said in those cases was the 'exclusive initial power' of the administrative officials to investigate and determine their own jurisdiction. If defendants were to win here, they would have discovered a way of 'running around the end' when blocked at the center. We do not take so lightly those recent and as yet undisturbed Supreme Court decisions."

which appellant relies, it follows *a fortiori* that appellant cannot do so.

The only authority on which appellant relies to sustain her contention that she is free to challenge the jurisdiction of the Board in a subpoena enforcement proceeding is an isolated statement in the Supreme Court's opinion in *Myers* v. *Bethlehem Shipbuilding Corporation,* 303 U. S. 41, 49 which reads as follows:

> The Board is even without power to enforce obedience to its subpoena to testify or to produce written evidence. To enforce obedience it must apply to a District Court; and to such an application appropriate defence may be made.

But this statement does not support appellant's contention. As the Supreme Court pointed out in *Oklahoma Press Publishing Co.* v. *Walling,* 327 U. S. 186, 212 a challenge to the administrative agency's jurisdiction is not "an appropriate defence."

The same contentions which appellant urges for denying enforcement of the subpoena were rejected by the District Court for the Southern District of Georgia in *N. L. R. B.* v. *Central of Georgia Railway Company, F. P. Love and D. G. Bland Lumber Company* (decided January 24, 1949, Civil No. 430, not reported). The Court in accordance with the practice of that Circuit, included in its order directing enforcement of the subpoena its reasons for overruling the employer's contentions. In pertinent part the Court's order reads as follows:

> The answer of the D. G. Bland Lumber Company pleads several defenses challenging the jurisdiction of Petitioner to conduct the

investigation in aid of which the subpoena was issued, asserting, among other things that the Petitioner is without power to conduct the investigation or to issue the subpoena because the labor organization which invoked its jurisdiction and the officers thereof had failed to comply with the requirements of Section 9 (f), (g), and (h) of the Act. The Court is of the opinion, however, that the question of the jurisdiction of the Petitioner to conduct the investigation is not before the Court and cannot be litigated in a proceeding to enforce a subpena but only in a proceeding brought pursuant to Section 10 of the Act in an appropriate Court of Appeals. *Endicott-Johnson Corporation* v. *Perkins,* 317 U. S. 501; *Oklahoma Press Publishing Co.* v. *Walling,* 327 U. S. 186; *Cudahy Packing Co.* v. *National Labor Relations Board,* 117 F. 2d 692 (C. A. 10); *Myers* v. *Bethlehem Shipbuilding Corporation,* 303 U. S. 41; *McCauley* v. *Waterman Steamship Corp.,* 327 U. S. 540.

For like reasons appellant's contentions should be rejected here.

III

Questions as to sufficiency of the pleadings and correctness of the Trial Examiner's rulings on the reception of evidence are not reviewable in subpoena enforcement proceedings

Appellant devotes a considerable portion of her brief to an effort to show that the complaint and charge in the administrative proceeding are insufficient to show that the requirements of Section 10 (b), 9 (f), (g), and (h) have been met. She argues at length that this claimed insufficiency of the formal

papers in the administrative proceeding, coupled with the refusal of the General Counsel of the Board to offer evidence showing compliance with the sections mentioned and the refusal of the Trial Examiner to receive evidence tending to show that they had not been complied with, demonstrated that the Board was without authority to proceed. These are matters which simply relate to the sufficiency of the pleadings, the adequacy of proof, and the correctness of rulings on the reception of evidence. We have shown (Point I, p. 4, *supra*) that appelant is merely a witness and that as such she is without standing to challenge the jurisdiction of the Board. For equal or greater reasons she is without standing to resist compliance with the subpoena for the reasons which pertain only to the merits and not to the jurisdiction of the Board.

All objections relating to the pleadings, proof, and conduct of the administrative proceeding may properly be urged by a party to that proceeding before the Board and in the event of an adverse decision by the Board in appropriate proceedings instituted in a Court of Appeals under Section 10 (e) or (f). But they are wholly irrelevant in a proceeding to enforce a subpoena. Even a party to the administrative proceeding could not defeat enforcement of a subpoena on such grounds. *Endicott Johnson Corp.* v. *Perkins,* 317 U. S. 501, 509 n. 11.

CONCLUSION

It is respectfully submitted that the judgment of the Court below is right and that it should be affirmed.

DAVID FINDLING,
Associate General Counsel,
A. NORMAN SOMERS,
Assistant General Counsel,
ALBERT M. DREYER,
Attorney,
National Labor Relations Board,
Washington 25, D. C.

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APPENDIX A

National Labor Relations Act (49 Stat. 449, 29 U. S. C. Supp. I 151) as amended by the Labor Management Relations Act, 1947 (61 Stat. 136, 29 U. S. C. 141 et seq.)

Section 9:

"(f) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, no petition under section 9 (e) (1) shall be entertained, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless such labor organization and any national or international labor organization of which such labor organization is an affiliate or constituent unit (A) shall have prior thereto filed with the Secretary of Labor copies of its constitution and bylaws and a report, in such form as the Secretary may prescribe, showing—

"(1) the name of such labor organization and the address of its principal place of business;

"(2) the names, titles, and compensation and allowances of its three principal officers and of any of its other officers or agents whose aggregate compensation and allowances for the preceding year exceeded $5,000, and the amount of the compensation and allowances paid to each such officer or agent during such year;

"(3) the manner in which the officers and agents referred to in clause (2) were elected, appointed, or otherwise selected;

"(4) the initiation fee or fees which new members are required to pay on becoming members of such labor organization;

"(5) the regular dues or fees which members are required to pay in order to remain members in good standing of such labor organization;

"(6) a detailed statement of, or reference to provisions of its constitution and bylaws showing the procedure followed with respect to, (a) qualification for or restrictions on membership, (b) election of officers and stewards, (c) calling of regular and special meetings, (d) levying of assessments, (e) imposition of fines, (f) authorization for bargaining demands, (g) ratification of contract terms, (h) authorization for strikes, (i) authorization for disbursement of union funds, (j) audit of union financial transactions, (k) participation in insurance or other benefit plans, and (l) expulsion of members and the grounds therefor;

and (B) can show that prior thereto it has—

"(1) filed with the Secretary of Labor, in such form as the Secretary may prescribe, a report showing all of (a) its receipts of any kind and the sources of such receipts, (b) its total assets and liabilities as of the end of its last fiscal year, (c) the disbursements made by it during such fiscal year, including the purposes for which made; and

"(2) furnished to all of the members of such labor organization copies of the financial report required by paragraph (1) hereof to be filed with the Secretary of Labor.

"(g) It shall be the obligation of all labor organizations to file annually with the Secretary of Labor, in such form as the Secretary of Labor may prescribe, reports bringing up to date the information required to be supplied in the initial filing by subsection (f) (A) of this section, and to file with the Secretary of Labor and furnish to its members annually financial reports in the form and manner prescribed in subsection (f) (B). No labor organization shall be eligible for certification under this section as the representative of any

employees, no petition under section 9 (e) (1) shall be entertained, and no complaint shall issue under section 10 with respect to a charge filed by a labor organization unless it can show that it and any national or international labor organization of which it is an affiliate or constituent unit has complied with its obligation under this subsection.

"(h) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, no petition under section 9 (e) (1) shall be entertained and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate of constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of section 35 A of the Criminal Code shall be applicable in respect to such affidavits.

Section 10:

"(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided,* That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any in-

dustry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith.

"(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided,* That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to in-

tervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U. S. C., title 28, secs. 723–B, 723–C).

Section 11:

"For the purpose of all hearings and investigations, which, in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by section 9 and section 10—

"(1) The Board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. The Board, or any member thereof, shall upon application of any party to such proceedings, forthwith issue to such party subpenas requiring the attendance and testimony of witnesses or the production of any evidence in such proceeding or investigation requested in such application. Within five days after the service of a subpena on any person requiring the production of any evidence in his possession or under his control, such person may petition the Board to revoke, and the Board shall revoke, such subpena if in its opinion the evidence whose production is required does not relate to any matter under investigation, or any matter in question in such proceedings, or if in its opinion such subpena does not describe with sufficient particularity the evidence whose production is required. Any member of the Board, or any agent or agency designated by the Board for such purposes, may administer

oaths and affirmations, examine witnesses, and receive evidence. Such attendance of witnesses and the production of such evidence may be required from any place in the United States or any Territory or possession thereof, at any designated place of hearing.

"(2) In case of contumacy or refusal to obey a subpoena issued to any person, any district court of the United States or the United States courts of any Territory or possession, or the District Court of the United States for the District of Columbia, within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or transacts business, upon application by the Board shall have jurisdiction to issue to such person an order requiring such person to appear before the Board, its member, agent, or agency, there to produce evidence, if so ordered, or there to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof.

"(3) No person shall be excused from attending and testifying or from producing books, records, correspondence, documents, or other evidence in obedience to the subpoena of the Board, on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, except that such individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying.

APPENDIX B

Comment on subpena enforcing requirements of Section 6 (c) of the Administrative Procedure Act appearing in Attorney General's Manual of The Administrative Procedure Act (Federal Prison Industries, Inc., Press (1947)), at pp. 68–69:

The second sentence of section 6 (c) provides that "Upon contest the court shall sustain any such subpena or similar process or demand to the extent that it is found to be in accordance with law and, in any proceeding for enforcement, shall issue an order requiring the appearance of the witness or the production of the evidence or data within a reasonable time under penalty of punishment for contempt in case of contumacious failure to comply." Upon its face, the subsection in requiring judicial enforcement of subpenas "found to be in accordance with law" is a reference to and an adoption of the existing law with respect to subpenas. For example, nothing in section 6 (c) seems intended to change existing law as to the reasonableness and scope of subpenas. Similarly, the subsection leaves unchanged existing law as to the scope of judicial inquiry where enforcement of a subpena is sought. In *Endicott Johnson Corp.* v. *Perkins,* 317 U. S. 501 (1943), the Supreme Court held that where the Secretary of Labor sought judicial enforcement of a subpena issued in a proceeding under the Walsh-Healey Public Contracts Act, the District Court was not authorized to determine whether the respondent was subject to that act, as a condition precedent to enforcement of the subpena. Accord, under the Fair Labor Standards Act, *Oklahoma Press Publishing Company* v. *Walling,* 327 U. S. 186 (1946). Nothing in the

language of section 6 (c) suggests any purpose to change this established rule. It is said only that the court shall enforce a subpena "to the extent that it is found to be in accordance with law." "Law" refers to the statutes which a particular agency administers, together with relevant judicial decisions.

This natural and literal construction of the second sentence of section 6 (c) finds conclusive support in the legislative history of the provision. When S. 7 was introduced by Senator McCarran on January 6, 1945, section 6 (c) provided that "Upon any contest of the validity of a subpena or similar process or demand, the court shall determine all relevant questions of law raised by the parties, *including the authority or jurisdiction of the agency.*" [Italics supplied.] Clearly this language could be construed as intended to change the rule stated in *Endicott Johnson Corp.* v. *Perkins, supra.* However, when S. 7 was reported by the Senate Committee on the Judiciary on November 19, 1945 (Sen. Rep. p. 34 (Sen. Doc. p. 220)), section 6 was rephrased in its present form. This significant change in language, as well as the natural and literal reading of section 6 (c), is persuasive that the subsection leaves unchanged the scope of judicial inquiry upon an application for the enforcement of a subpena. See also Sen. Rep. p. 41 (Sen. Doc. p. 227); 92 Cong. Rec. A2988 (Sen. Doc. p. 415).

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